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# Criminal Procedure

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# Criminal Procedure

## Criminal Procedure; appeals

Penal Code § 1238 (amended).

AB 2287 (Peace); 1986 STAT. Ch. 59

Sponsor: Los Angeles District Attorney

Support: Attorney General; California District Attorneys Association

Opposition: American Civil Liberties Union

Existing law limits the circumstances in which the prosecution may appeal a criminal case.<sup>1</sup> Chapter 59 expands existing law by authorizing a prosecutor to appeal the imposition of an unlawful sentence,<sup>2</sup> whether or not the court suspends the execution of that sentence.<sup>3</sup> Chapter 59 further specifies that an order granting probation is not appealable.<sup>4</sup> Rather, Chapter 59 provides that the prosecution may seek appellate review of any grant of probation by means of a

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1. CAL. PENAL CODE § 1238(a). Under existing law, the people may appeal (1) an order setting aside the indictment, information, or complaint; (2) a judgment for defendant on a demurrer to the indictment, accusation, or information; (3) an order granting a new trial; (4) an order arresting judgment; (5) an order made after judgment, affecting the substantial rights of the people; (6) an order modifying the verdict or finding by reducing the degree of the offense or punishment imposed, or modifying the offense to a lesser offense; (7) an order to dismiss the case prior to trial when the dismissal is based upon an order suppressing evidence; (8) an order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy, or where the defendant has waived jeopardy; and (9) an order denying the prosecutor's motion to reinstate the complaint. *Id.* See generally *Review of Selected 1978 California Legislation*, 10 PAC. L.J. 418 (1979) (appeal from order modifying conviction to lesser included offense under Penal Code § 1238). See also *People v. Thompson*, 10 Cal. App. 3d 129, 135, 88 Cal. Rptr. 753, 757 (1970) (right to appeal from an order or judgment in a criminal case is purely statutory; no appeal by the people is proper unless expressly permitted by the Penal Code (quoting *People v. Hale*, 232 Cal. App. 2d 112, 125, 42 Cal. Rptr. 533, 541 (1965))).

2. An unlawful sentence is the imposition of a sentence not authorized by law or based upon an unlawful court order which strikes or modifies the effect of an enhancement or prior conviction. CAL. PENAL CODE § 1238(a)(10).

3. *Id.* The prosecutor may not appeal that portion of a sentence based upon the court's choice that a term of imprisonment be (1) the upper, middle, or lower term, unless the term selected is not set forth in an applicable statute, or (2) consecutive or concurrent to another term of imprisonment, unless an applicable statute requires that the term be consecutive. *Id.*

4. *Id.* § 1238(d).

petition for a writ of mandate or prohibition, if the writ is filed within sixty days after probation is granted.<sup>5</sup>

*JEC*

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5. *Id.* A person may seek appellate review in this manner whether or not the court imposes a sentence. *Id.*

## **Criminal Procedure; continuances—conflict in scheduling**

Penal Code § 1050 (amended).

SB 1923 (McCorquodale); 1986 STAT. CH. 1172

Sponsor: Author

Support: Los Angeles Municipal Judge's Association; County Clerk's Association; Judicial Council

To continue any hearing in a criminal proceeding, including the trial, existing law requires that written notice<sup>1</sup> be filed and served<sup>2</sup> on all parties to the proceeding at least two days<sup>3</sup> before the hearing sought to be continued.<sup>4</sup> Existing law provides that a party may make a motion for continuance without filing and serving notice, but the moving party must show good cause for failing to comply with the notice requirements, or the court may impose sanctions.<sup>5</sup> Chapter 1172 expands existing law by requiring an attorney, within two court days of learning of a conflict in the scheduling of any court hearings, to notify the calendar clerk of each court involved, in writing, indicating which hearing was set first.<sup>6</sup>

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1. Affidavits or declarations specifying the facts showing that the continuance is necessary must be filed and served with the notice. CAL. PENAL CODE § 1050(b).

2. A party will not be deemed to have been served until that party actually receives a copy of the documents to be served, unless, after receiving actual notice of the request for continuance, the party waives the right to have the documents served in a timely manner. *Id.*

3. *Id.* § 1050(b) (two days refers to two court days).

4. *Id.*

5. *Id.* § 1050(c); *see id.* § 1050.5 (possible sanctions include imposition of a fine of up to \$1,000 upon counsel for the moving party, and the filing of a report with an appropriate disciplinary committee).

6. *Id.* § 1050(b)(2).

## Criminal Procedure; Crime Victims Trial Attendance Act

Penal Code § 1102.6 (new).

SB 1816 (Davis); 1986 STAT. CH. 1273

Sponsor: California Commission on Crime and Punishment

Support: OCJP; The Youth Authority

Opposition: American Civil Liberties Union; The California Attorneys for Criminal Justice

Under existing law, the victim of a criminal offense has the right to attend all criminal sentencing proceedings regarding that offense.<sup>1</sup> Chapter 1273, enacting the California Crime Victims Trial Attendance Act (the Act), permits a victim<sup>2</sup> to also attend the criminal trial for that offense.<sup>3</sup> Pursuant to Chapter 1273, attendance of the victim must be permitted unless the court finds that the attendance poses a substantial risk of influencing or affecting the content of any testimony.<sup>4</sup> If the victim is permitted to attend the trial, the defendant may object to the order of the victim's testimony, and the victim will be required to testify first, subject to exclusion if the foundation or *corpus delicti*<sup>5</sup> is not later established by the testimony of other prosecution witnesses.<sup>6</sup> Chapter 1273 further provides that on the court's own motion or upon the motion of either party, the court

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1. CAL. PENAL CODE § 1191.1. The victim of a crime, the parent of a minor victim, or the next of kin of a deceased victim has the right to attend all criminal sentencing proceedings. *Id.*

2. As used in this Act, victim means: (1) the alleged victim of the offense, and one member of the victim's immediate family; and (2) up to two members of the victim's immediate family who are actual or potential witnesses, if the victim is unable to attend the trial. *Id.* § 1102.6(e).

3. *Id.* § 1102.6(a). The failure of the victim to exercise any right granted to the victim by this Act is not a ground for an appeal, or for any court to set aside, reverse, or remand the criminal conviction. *Id.* § 1102.6(f). Chapter 1273 was enacted in response to a legislative finding that to assure fair and impartial administration of justice, a victim of a criminal offense cannot be excluded from any trial relating to the offense merely because the victim may testify at the trial, or because of any arbitrary or invidious reason. 1986 Cal. Stat. ch. 1273, sec. 1(b), at \_\_\_\_\_. *But cf.* CAL. EVID. CODE § 777 (the court may exclude from the courtroom all witnesses except those under examination).

4. *Id.* § 1102.6(a) (where risk of affecting testimony exists, the court may exclude the victim from the entire proceeding, or only part of the proceeding).

5. B. WITKIN, CALIFORNIA CRIMES § 88 (1963 & Supp. 1983) (definition of *corpus delicti*).

6. CAL. PENAL CODE § 1102.6(b).

may remove the victim if the victim's conduct is disruptive to the proceedings.<sup>7</sup>

*SLP*

7. *Id.* §§ 1102.6(d), 1043(b)(1), 1043.5(b)(1). The court is required to remove the victim from the trial if at anytime the prosecution so requests. *Id.* § 1102.6(d). In addition, upon request by either party or motion by the court, Chapter 1273 provides for mandatory exclusion of the victim from any hearing on a motion relating to the victim's attendance at trial. *Id.* § 1102.6(c).

## **Criminal Procedure; criminal judgment—absence of defendant**

Penal Code § 1193 (amended).  
SB 2558 (Robbins); 1986 STAT. CH. 1106  
Sponsor: State Bar of California

Under existing law, any defendant convicted of a felony has the right to be present when judgment is pronounced unless, after reasonable diligence<sup>1</sup> to procure his or her presence, the interests of justice would be served by pronouncing judgment in the defendant's absence.<sup>2</sup> Chapter 1106 permits the court to approve a waiver of the right to be present at judgment when the defendant, in open court<sup>3</sup> or in a notarized writing, requests that judgment be pronounced *in absentia*, and that the defendant's attorney be present when judgment is pronounced.<sup>4</sup> If a *pro se* defendant, convicted of a noncapital offense, requests that judgment be pronounced *in absentia*, the court is required to appoint an attorney to represent the defendant at the sentencing.<sup>5</sup>

*SFH*

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1. *People v. Brown*, 102 Cal. App. 2d 60, 62-63, 226 P.2d 609, 610-11 (1951) (the court's issuance of a bench warrant and forfeiture of bail in the face of the defendant's repeated absences from probation hearing did not constitute reasonable diligence justifying pronouncement of judgment in defendant's absence).

2. CAL. PENAL CODE § 1193(a). *Cf. id.* § 1193(b) (if convicted of a misdemeanor, judgment may be pronounced in the absence of the defendant).

3. A defendant's oral request for waiver of the right to be present at judgment must be included on the record. *Id.* § 1193(a).

4. *Id.*

5. *Id.*

## Criminal Procedure; dismissal of prior felony convictions

Penal Code §§ 667, 1385 (amended).

AB 2049 (Katz); 1986 STAT. Ch. 85

(Effective May 6, 1986)

Sponsor: Author

Support: Los Angeles County Board of Supervisors; Attorney General; California Peace Officers Association; Mothers Against Drunk Drivers

Opposition: American Civil Liberties Union; California Public Defenders Association; California Attornys for Criminal Justice

Under existing law, any person convicted of a serious felony,<sup>1</sup> who previously has been convicted of such a felony, will receive a five-year sentence enhancement for each of those prior convictions, in addition to any sentence imposed for the present offense.<sup>2</sup> Existing law also provides that a trial court has the discretion to dismiss any action in furtherance of justice.<sup>3</sup> In *People v. Fritz*,<sup>4</sup> the California Supreme Court construed this discretion as authorizing a judge, for sentencing purposes, to strike prior convictions.<sup>5</sup> With the enactment

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1. CAL. PENAL CODE § 667(d) (definition of serious felony). *See id.* § 1192.7(c) (list of serious felonies).

2. *Id.* § 667(a). The terms of the present offense and each sentence enhancement must run consecutively. *Id.* A sentence enhancement may not be applied when the punishment imposed by other provisions of law would result in a longer term of imprisonment. *Id.* § 667(b). Prior incarceration or commitment is not required for a sentence enhancement to apply. *Id.*

3. *Id.* § 1385(a). *See, e.g.,* *People v. Whigham*, 158 Cal. App. 3d 1161, 1169, 205 Cal. Rptr. 227, 232 (1984) (trial court has the power to strike or stay five-year sentence enhancements under Penal Code § 667(a)); *People v. Burke*, 47 Cal. 2d 45, 50-51, 301 P.2d 241, 244-45 (1956) (trial court has the discretion to dismiss any action in the furtherance of justice). The judge or magistrate may order the dismissal of an action sua sponte or upon the prosecuting attorney's application. CAL. PENAL CODE § 1385(a). No dismissal, however, may be made for any reason that would be grounds for a demurrer to an accusatory pleading. *Id.* § 1385(a).

4. 40 Cal. 3d 227, 707 P.2d 833, 219 Cal. Rptr. 460 (1985).

5. *See id.* at 231, 707 P.2d at 835, 219 Cal. Rptr. at 462 (neither Penal Code § 667 nor article I, § 28(f) of the California Constitution, which were enacted as Proposition 8, can be construed to abolish the well-established statutory authority of a trial court to strike a prior conviction). *See also* *People v. Whigham*, 158 Cal. App. 3d at 1169, 205 Cal. Rptr. at 232 (Penal Code § 1385 authorizes a trial court to strike a five-year sentence enhancement); *People v. Williams*, 30 Cal. 3d 470, 477-90, 637 P.2d 1029, 1032-40, 179 Cal. Rptr. 443, 446-54 (1981) (Penal Code § 1385 permits a judge to strike prior convictions in the interests of justice in any situation in which the legislature has not clearly evidenced a contrary intent). *Cf.* CAL. CONST. art. I, § 28(f) (any prior felony conviction may be used without limitation for purposes of enhancing a sentence in a criminal proceeding). *But see* *People v. Fritz*, 40 Cal. 3d at 234, 707 P.2d at 837, 219 Cal. Rptr. at 464 (Lucas, J., dissenting) (the clear intent of the people in enacting Proposition 8 was to assure that prior serious felony convictions would be used without limitation for sentence enhancement purposes, and trial courts therefore have no power to strike those convictions for sentence enhancement purposes).

of Chapter 85, the legislature intends to abrogate the holding of *People v. Fritz* by restricting the authority of a trial court to strike prior convictions of serious felonies when imposing a sentence enhancement.<sup>6</sup> Chapter 85 expressly provides that the authority of a trial court to dismiss an action in furtherance of justice does not authorize that court to strike any prior conviction of a serious felony for sentence enhancement purposes.<sup>7</sup>

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6. 1986 Cal. Stat. ch. 85, sec. 3, at \_\_\_\_.

7. CAL. PENAL CODE § 1385(b).

## **Criminal Procedure; motion to suppress evidence**

Penal Code § 1538.5 (amended).

AB 2328 (Stirling); 1986 STAT. CH. 52

Sponsor: Los Angeles County Sheriff

Prior law provided that, in felony cases, a defendant's motion to suppress evidence<sup>1</sup> from an alleged unreasonable search or seizure<sup>2</sup> could have been reviewed de novo by a special hearing of the superior court, regardless whether that motion had been denied at a preliminary hearing.<sup>3</sup> The magistrate of the special hearing could use the transcript from the preliminary hearing as evidence, but would not be bound by the outcome.<sup>4</sup> Chapter 52 prohibits the defendant from relitigating the validity of the search or seizure at the special hearing, if a motion challenging the legality of the search or seizure was heard at the preliminary hearing.<sup>5</sup> If that issue was previously litigated, the evidence at the special hearing must be limited to the transcript of

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1. CAL. PENAL CODE § 1538.5(a) (grounds for motion to suppress evidence).

2. U.S. CONST. amend. IV (constitutional guarantee from unreasonable governmental search or seizure); CAL. CONST. art. 1, § 13 (California provision against unreasonable search and seizure).

3. 1967 Cal. Stat. ch. 1537, sec. 1, at 3653 (enacting CAL. PENAL CODE § 1538.5).

4. See *People v. Cagle*, 21 Cal. App. 3d 57, 60, 98 Cal. Rptr. 348, 349 (1956).

5. CAL. PENAL CODE § 1538.5(i). The motion may still be heard at the special hearing if the offense was initiated by an indictment. *Id.* The legislature's intent in enacting Chapter 52 is to make procedural changes only, not to create any new grounds for the exclusion of evidence. 1986 Cal. Stat. ch. 52, sec. 2, at \_\_\_\_ (amending CAL. PENAL CODE § 1538.5).

the prior hearing.<sup>6</sup> Chapter 52, however, does not affect the State's right to a de novo review, if the motion was granted at the preliminary hearing.<sup>7</sup>

Under Chapter 52, new evidence may be introduced at the special hearing, if that evidence could not reasonably have been presented at the preliminary hearing.<sup>8</sup> If the State objects to the introduction of the new evidence based on its availability at the prior hearing, the defendant is entitled to an *in camera*<sup>9</sup> hearing to determine the issue.<sup>10</sup> The findings of the magistrate are binding on the superior court,<sup>11</sup> unless a review is granted to the defendant by an extraordinary writ of mandate.<sup>12</sup>

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6. *Id.* § 1538.5(i). The motion to suppress the evidence may be relitigated at the special hearing if the parties made a prior agreement. The State, however, may always recall witnesses at the special hearing who testified at the preliminary hearing. *Id.*

7. Compare CAL. PENAL CODE § 1538.5(j) with 1967 Cal. Stat. ch. 1537, sec. 1, at 3654 (enacting CAL. PENAL CODE § 1538.5).

8. CAL. PENAL CODE § 1538.5(i). See also *id.* § 1538.5(h). If, prior to the trial, opportunity for the motion did not exist, or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make the motion during the course of the trial in the municipal, justice, or superior court. *Id.*

9. A cause is said to be heard *in camera* either when the hearing is heard before the judge in his private chambers or when all spectators are excluded from the courtroom. BLACK'S LAW DICTIONARY 684 (5th ed. 1979).

10. CAL. PENAL CODE § 1538.5(i).

11. *Id.*

12. *Id.*

## Criminal Procedure; multiple sentence enhancements

Penal Code § 1170.1 (amended).

AB 4026 (Peace); 1986 STAT. Ch. 1429

Sponsor: Author

Support: National Rifle Association; California Rifle and Pistol Association; California District Attorney's Association

Opposition: American Civil Liberties Union

Under existing law, when two or more sentence enhancements<sup>1</sup> may be imposed for any single offense, only the greatest enhancement

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1. Includes any sentence enhancement under Penal Code §§ 12022(a) (one-year enhancement imposed on a principal involved in a felony while armed with a firearm); 12022(b) (one-



applies.<sup>2</sup> Existing law provides, however, that in cases of robbery,<sup>3</sup> rape,<sup>4</sup> and burglary,<sup>5</sup> as well as attempts of these crimes, the court may impose both an enhancement for weapons and an enhancement for the intentional infliction of great bodily injury.<sup>6</sup> Chapter 1429 expands existing law by adding penetration of a genital or anal opening of another person by a foreign object,<sup>7</sup> oral copulation,<sup>8</sup> sodomy,<sup>9</sup> attempts of any of these crimes, and attempted murder<sup>10</sup> to the list of cases in which the court may impose enhancements for both weapons and great bodily injury.<sup>11</sup> Existing law provides that the number of enhancements which may be imposed for certain specified sex crimes<sup>12</sup> is not limited.<sup>13</sup> Chapter 1429 deletes penetration of a genital or anal opening of another person by a foreign object, when not committed by force, from this list of specified crimes subject to unlimited enhancements.<sup>14</sup>

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year enhancement imposed for personal use of a deadly or dangerous weapon in a felony, when use of the weapon is not an element of the felony); 12022.4 (two-year enhancement imposed for furnishing or offering to furnish a firearm to another during a felony, for the purpose of aiding, abetting, or enabling another to commit a felony); 12022.5 (two-year enhancement imposed for personal use of a firearm in a felony); 12022.7 (three-year enhancement imposed for personally and intentionally inflicting significant or substantial physical injury on a person not an accomplice during a felony); or 12022.9 (five-year enhancement imposed for intentional infliction of injury upon a pregnant woman resulting in the termination of a pregnancy). CAL. PENAL CODE § 1170.1(e).

2. *Id.* § 1170.1(e). A sentence enhancement must be pleaded and proven. *Id.* § 1170.1(f).

3. *Id.* § 211 (definition of robbery).

4. *Id.* § 261 (definition of rape).

5. *Id.* § 459 (definition of burglary).

6. *Id.* § 1170.1(e).

7. *Id.* § 289 (penetration by a foreign object, substance, instrument, or device).

8. *Id.* § 288a (definition of oral copulation).

9. *Id.* § 286 (definition of sodomy).

10. See 1 B. WITKIN, CALIFORNIA CRIMES §§ 93-104 (1963 & Supp. 1983) (discussing attempted crimes).

11. CAL. PENAL CODE § 1170.1(e).

12. *Id.* § 1170.1(i) (specified crimes include (1) violent rape; (2) rape following the administration of any intoxicating substance which prevents the victim from resisting; (3) rape in concert by force or violence; (4) lewd or lascivious acts with a child under 14 with force, violence, or duress; (5) penetration of a genital or anal opening by a foreign object by force, violence, duress, menace, or fear of immediate and unlawful bodily injury; and (6) sodomy or oral copulation by force, violence, duress, menace, or threat of great bodily harm).

13. *Id.* § 1170.1(i).

14. *Id.* Each sentence enhancement must be served separately and may not be merged with any other term or enhancement. *Id.*

## Criminal Procedure; own recognizance release

Penal Code § 1319 (new).

AB 3521 (Papan); 1986 STAT. Ch. 543

(Effective August 21, 1986)

Sponsor: San Francisco District Attorney

Support: California Peace Officers Association

Opposition: Judicial Council; San Diego County Board of Supervisors; California Attorneys for Criminal Justice; California Public Defenders Association; The State Bar of California

Under existing law, persons arrested or charged with an offense, other than a capital offense, may be released on their own recognizance<sup>1</sup> by a court or magistrate who has the authority to release arrestees on bail.<sup>2</sup> Chapter 543 also requires a judge or magistrate to hold a hearing in open court before releasing persons arrested for a violent felony on their own recognizance.<sup>3</sup> Chapter 543 requires that the prosecuting attorney be given notice and a reasonable opportunity to be heard on the matter.<sup>4</sup> In addition, Chapter 543 provides that defendants charged with a violent felony will not be

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1. In appropriate cases, releasing persons on their own recognizance is an alternative to bail, and individuals so released are subject to restraints not shared by the public generally. *In re Smiley*, 66 Cal. 2d 606, 613, 427 P.2d 179, 183, 58 Cal. Rptr. 579, 583 (1967); *People v. McCaughey*, 261 Cal. App. 2d 131, 136, 67 Cal. Rptr. 683, 686 (1968).

2. CAL. PENAL CODE § 1270. When determining whether a detainee will appear for subsequent court proceedings if released on the individual's own recognizance, the trial court must consider the detainee's ties to the community, which include the following: (1) employment or other sources of income; (2) the duration and location of residence; (3) family attachments; (4) property holdings; (5) any independent reasons for wanting to leave or remain in the community; (6) the detainee's record of appearances at past court hearings, or flights to avoid prosecution; and (7) the severity of the sentence the detainee faces. *Van Atta v. Scott*, 27 Cal. 3d 424, 438, 613 P.2d 210, 216, 166 Cal. Rptr. 149, 155 (1980). Only when the most serious offenses are charged can the question of severity of sentence be considered dispositive of the issue. *Id.* at 438 n.12, 613 P.2d at 216 n.12, 166 Cal. Rptr. at 155 n.12. Before release on the defendant's own recognizance, the defendant must sign a release agreement which provides that the individual (1) promises to appear at all times and places, as ordered by a court or magistrate before whom the charge is pending; (2) promises not to leave California without court permission; (3) agrees to waive extradition if the defendant fails to appear as required and is apprehended outside the State of California; and (4) acknowledges that the defendant has been informed of the consequences and penalties applicable to violation of the conditions of release. CAL. PENAL CODE § 1318.

3. CAL. PENAL CODE § 1319. Violent felonies include the following: (1) murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or threat of great bodily harm; (5) oral copulation by force, violence, duress, menace, or threat of great bodily harm; (6) lewd acts on a child under 14; (7) any felony punishable by death or state imprisonment for life; and (8) any other felony in which the defendant inflicts great bodily injury on a person other than an accomplice. *Id.* §§ 1319, 667.5.

4. *Id.* § 1319.

released on their own recognizance when clear and convincing evidence appears to show they have previously been charged with a felony offense and have willfully and without excuse failed to appear in court as required.<sup>5</sup>

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5. *Id.* The reasons for denial or grant of recognizance release must be included in the court's minutes. *Id.*

## **Criminal Procedure; pornography—definitions**

Penal Code §§ 311, 312.1, 313 (amended).

SB 139 (Deddeh); 1986 STAT. Ch. 51

Sponsor: City of San Diego

Support: Department of Corrections; Department of Finance; San Diego County

Opposition: The Alliance of Motion Picture and Television Producers; American Civil Liberties Union; California Attorneys for Criminal Justice; California Library Association

Under existing law, matter<sup>1</sup> or live conduct<sup>2</sup> is obscene if, taken as a whole, (1) the matter or conduct, applying contemporary standards,<sup>3</sup> appeals predominantly to the average person's<sup>4</sup> prurient interest;<sup>5</sup> (2) the matter or conduct goes substantially beyond customary

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1. Matter includes (1) any book, magazine, newspaper, or other printed or written material; (2) any picture, drawing, photograph, motion picture, or other pictorial representation; (3) any statue or other figure; (4) any recording, transcription or mechanical, chemical, or electrical reproduction; or (5) any other article, equipment, machine, or material. CAL. PENAL CODE § 311(b).

2. *Id.* § 311(g) (any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming). *See id.* § 311.6 (any person who participates in, produces, or presents any obscene live conduct in a public place is guilty of a misdemeanor).

3. *See People v. Enskat*, 33 Cal. App. 3d 900, 913-14, 109 Cal. Rptr. 433, 442 (1973) (if the conduct in question is so patently offensive as to violate any conceivable community standard, evidence is not necessary, and expert testimony need not be considered upon that issue).

4. CAL. PENAL CODE § 311(c) (a person is any individual, partnership, firm, association, corporation, or other legal entity).

5. *Id.* § 311(a) (prurient interest means a shameful or morbid interest in nudity, sex, or excretion). *See Miller v. California*, 413 U.S. 15, 30 (1972) (whether matter appeals to a prurient interest or is patently offensive is a question of fact).

limits of candor in description or representation<sup>6</sup> of matter that appeals to a prurient interest;<sup>7</sup> and (3) the matter or conduct is utterly without redeeming social importance.<sup>8</sup> Chapter 51 removes the third prong of this standard and requires instead that the matter or conduct lack significant literary, artistic, political, educational, or scientific value.<sup>9</sup>

Existing law provides that matter is deemed harmful matter if, taken as a whole, (1) the matter, applying contemporary standards, predominantly appeals to an average person's prurient interest; (2) the matter is patently offensive to the prevailing standards in the adult community as a whole, with respect to what is suitable material for minors; and (3) the matter is utterly without redeeming social importance for minors.<sup>10</sup> Chapter 51 replaces the third prong of this standard by requiring instead that the matter lack significant literary, artistic, political, educational, or scientific value for minors.<sup>11</sup> In addition, Chapter 51 codifies existing case law<sup>12</sup> by specifying the applicable contemporary standard with respect to obscene matter,<sup>13</sup>

6. See CAL. PENAL CODE § 311(a)(3) (whether a defendant knows matter depicts persons under the age of 16 engaging in sexual conduct is a factor to consider in determining if matter goes substantially beyond customary limits of candor in description or representation).

7. *Id.*

8. *Id.* § 311(a). See *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 920, 383 P.2d 152, 163-64, 31 Cal. Rptr. 800, 812-13 (1963) (by employing the term "utterly," the legislature intended to give legal sanction to all material relating to sex except that which is totally devoid of social importance); *Miller v. California*, 413 U.S. 15, 23 (1972) (obscene material is unprotected by the first amendment). See also *id.* § 311.5 (every person who in any manner promotes the sale, distribution, or exhibition of matter represented or held out by that person as obscene, is guilty of a misdemeanor). See generally *Hirst, I Know it When I Seize it: Selected Problems in Obscenity*, 4 Loy. L.A.L. REV. 9, 13 (1971) (historical development of, and California approach to, defining social importance).

9. CAL. PENAL CODE § 311(a). See *Bloom v. Municipal Court*, 16 Cal. 3d 71, 78, 545 P.2d 229, 233, 127 Cal. Rptr. 317, 320-21 (1976) (states may impose a greater burden of proof than is required by the federal constitution); *Miller v. California*, 413 U.S. 15, 24 (1972) (the court eliminated the utterly without social importance standard, and replaced this standard with the more stringent requirement that a work merely lack serious literary, artistic, political, or scientific value). See generally *Comment, Miller v. California: A Mandate for New Obscenity Legislation*, 45 Miss. L.J. 435 (1972) (discussion of the United States Supreme Court decision in *Miller*).

10. CAL. PENAL CODE § 313. See *id.* § 313(g) (definition of a minor).

11. *Id.* § 313.

12. *In re Giannia*, 69 Cal. 2d 563, 577, 422 P.2d 535, 545, 72 Cal. Rptr. 655, 665 (1968) (for the purpose of determining obscenity, the relevant community is the entire state of California). See also *Miller v. California*, 413 U.S. 15, 32 (1972) (a national standard would not be workable because such a standard would require that Maine and Mississippi accept public standards of conduct that are found tolerable in Las Vegas or New York City).

13. CAL. PENAL CODE § 311(a).

harmful matter,<sup>14</sup> and live conduct<sup>15</sup> is the contemporary statewide standard.<sup>16</sup>

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14. *Id.* § 313(a) (definition of harmful matter).

15. *Id.* § 311(g) (in determining whether live conduct is beyond customary limits of candor, the fact the defendant knows the live conduct depicts persons under the age of 16 years engaged in sexual conduct is a factor which can be considered).

16. *Id.* §§ 311(a), (g); 313(a).

## **Criminal Procedure; preliminary examinations—exclusion**

Penal Code §§ 867, 868 (amended).

SB 1797 (Royce); 1986 STAT. Ch. 868

Sponsor: Mothers Against Drunk Drivers; Orange County

Opposition: American Civil Liberties Union; The State Bar of California Criminal Law Section

Existing law provides that in a preliminary examination<sup>1</sup> a magistrate<sup>2</sup> must, upon motion by either party, exclude all potential and actual witnesses who have not yet testified.<sup>3</sup> Chapter 868 authorizes either party to challenge the exclusion of any person, and, upon motion by either party, requires the magistrate to hold a hearing, on the record, to determine if the person sought to be excluded is in fact excludable.<sup>4</sup>

Existing law requires that a preliminary hearing be open to the public.<sup>5</sup> A magistrate must, however, upon the request of the defendant,<sup>6</sup> exclude everyone except certain specified persons,<sup>7</sup> if the exclu-

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1. See *People v. Hanson*, 197 Cal. App. 2d 658, 665, 17 Cal. Rptr. 334, 338 (1961) (provisions for the exclusion and separation of witnesses, orders not to converse, and the exclusion of the public upon the request of the defendant, apply only to preliminary examinations, and not to the actual trial).

2. CAL. PENAL CODE § 807 (definition of magistrate). See *id.* § 808 (persons designated as magistrates).

3. *Id.* § 867.

4. *Id.*

5. *Id.* § 868.

6. A defendant's right to request the exclusion of certain persons is a substantial safeguard to a fair and impartial trial and cannot be disregarded by the magistrate. *People v. Elliot*, 54 Cal. 2d 498, 504, 354 P.2d 225, 229, 6 Cal. Rptr. 753, 757 (1960).

7. Persons who are not excludable include (1) the clerk, (2) the court reporter, (3) the bailiff, (4) the prosecutor and the prosecutor's counsel, (5) the Attorney General, (6) the

sion is necessary to protect the defendant's right to a fair and impartial trial.<sup>8</sup> Chapter 868 expands the group of persons that may not be excluded by providing that, upon motion by the prosecution, members of the alleged victim's family<sup>9</sup> are entitled to be present during the examination.<sup>10</sup> A magistrate, however, must deny the prosecution's motion if exclusion is necessary to protect the defendant's right to a fair and impartial trial.<sup>11</sup> In addition, Chapter 868 provides that the motion must be denied if there is a reasonable likelihood that attendance by a member of the alleged victim's family poses a risk of affecting the testimony of the victim or any other witness.<sup>12</sup>

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county district attorney, (7) the investigating officer, (8) the officer having custody of a prisoner witness while the prisoner is testifying, (9) the defendant and the defendant's counsel, and (10) the officer having the defendant in custody. *Id.* § 868. Furthermore, one person may be present for the moral support of the prosecuting witness during a preliminary examination, provided that the person is not a witness. *Id.* See also CAL. EVID. CODE § 777 (a party to an action is not subject to an order of exclusion).

8. CAL. PENAL CODE § 868. One of the main purposes of excluding the public upon the request of the defendant is to give defendants the opportunity to protect their right to an impartial and unbiased jury by preventing dissemination of testimony, either by newspaper or other media, prior to trial. *People v. Duckett*, 210 Cal. App. 2d 867, 869, 26 Cal. Rptr. 926, 927 (1962).

9. CAL. PENAL CODE § 868 (members of the alleged victim's family include the alleged victim's spouse, parents, legal guardian, children, or siblings).

10. *Id.* § 868. The court must caution members of the alleged victim's family who are present and seated during the examination not to discuss any testimony with family members, witnesses, or the public. *Id.*

11. *Id.*

12. *Id.* Information provided by the defendant or noticed by the court may be sufficient to establish that attendance of a member of the alleged victim's family poses a risk of affecting the context of testimony. *Id.*

## Criminal Procedure; prisoners' rights—reading material

Penal Code § 2601 (amended).

SB 1693 (Roberti); 1986 STAT. Ch. 1171

Sponsor: Department of Corrections

Under existing law, state prisoners have a civil right to purchase, receive, and read<sup>1</sup> any reading materials<sup>2</sup> accepted for distribution by

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1. CAL. PENAL CODE § 2601(c) (includes permitting other inmates to read).

2. *Id.* (includes all legal materials, newspapers, periodicals, and books).

the United States Post Office, with certain exceptions.<sup>3</sup> Chapter 1171 restricts the existing civil rights of state prisoners by granting the Director of Corrections<sup>4</sup> the sole discretion to prohibit any reading materials which, in the Director's judgment, depict, portray, or describe a sexual assault upon a correctional employee.<sup>5</sup>

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3. *Id.* § 2601(c). The exceptions to this rule are those materials which describe the making of any weapon, explosive, poison, or destructive device. *Id.* See *id.* § 2600. Prisoners may be deprived of their civil rights only to the extent necessary to provide for reasonable security of the institution and public. See *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887, 899 (1945) (prisoners retain all rights of ordinary citizens except those expressly, or by necessary implication, taken from them by law). CAL. PENAL CODE § 2600 must be viewed as a prison "bill of rights," setting forth certain fundamental guarantees which are to be protected against arbitrary infringement. *In re Harrell*, 2 Cal. 3d 675, 698, 470 P.2d 640, 655, 87 Cal. Rptr. 504, 519 (1970). This prison "bill of rights," however, clearly permits the exclusion of any matter of a character tending to incite any form of violence. *Id.* at 704, 470 P.2d at 659, 87 Cal. Rptr. at 523. Any limitation on first amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. See *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). See generally Stern, *Prison Mail Censorship: A Nonconstitutional Analysis*, 23 HASTINGS L.J. 995 (1972) (discussion of the justifications for prison mail censorship).

4. The Director of Corrections is appointed by the Governor with the advice and consent of the Senate. In addition, the Governor may retain or remove the Director, and the action for removal is final. CAL. PENAL CODE § 5051.

5. *Id.* § 2601(c). See *Bell v. Wolfish*, 441 U.S. 520, 547 (1972) (prison officials must be free to take appropriate actions to ensure the safety of inmates and prison personnel); *In re van Geldern*, 14 Cal. App. 3d 838, 844, 92 Cal. Rptr. 592, 596 (1971) (publication depicting homosexual activity was excluded by prison officials because the publication would tend to "arouse and stimulate the sexual passions and desires of the prisoners"); *but cf. In re Bell*, 110 Cal. App. 3d 818, 823, 168 Cal. Rptr. 100, 103 (1980) (actions by prison officials are not necessary if the intended goal can effectively be promoted by less restrictive means). See generally Comment, *Constitutional Rights in Prison: The Standard of Review in California*, 16 PAC. L.J. 1077 (1985) (discussion of *Bell v. Wolfish* and the history of Penal Code § 2600); Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A.B.A. J. 1051 (1970) (discussion of prison censorship and suggested alternatives).

## **Criminal Procedure; rights of victims and witnesses**

Penal Code §§ 679, 679.01, 679.02 (new); §§ 11116.10, 13835.5 (amended).

AB 2779 (Calderon); 1986 STAT. CH. 1427

Sponsor: Attorney General

Existing law requires that all parties to a criminal proceeding be notified at least two days prior to a hearing on a motion to continue

the proceeding.<sup>1</sup> Under Chapter 1427, victims<sup>2</sup> to, and witnesses<sup>3</sup> of, a crime<sup>4</sup> must be notified as soon as feasible when: (1) the court proceeding to which the victim or witness has been subpoenaed will not proceed as scheduled, and (2) the prosecuting attorney determines the victim's or witness' presence is not required.<sup>5</sup> Existing law further provides that a prosecuting attorney must notify the victim<sup>6</sup> of a crime<sup>7</sup> of the final disposition<sup>8</sup> of the case within sixty days, upon the victim's request.<sup>9</sup> Chapter 1427 extends this notification right to any witness who makes such a request.<sup>10</sup>

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1. CAL. PENAL CODE § 1050(b) (procedures regarding motions to continue).
  2. *Id.* § 679.01(b) (definition of victim).
  3. *Id.* § 679.01(c) (definition of witness).
  4. *Id.* § 679.01(a) (definition of crime).
  5. *Id.* § 679.02(a)(1).
  6. *Id.* § 11116.10(b) (a victim is defined as any person alleged or found, upon the record, to have sustained physical or financial injury to person or property as a direct result of the crime charged).
  7. *Id.* § 15 (definition of crime).
  8. *Id.* § 11116.10(c) (definition of final disposition).
  9. *Id.* § 11116.10(a). Notification must be made by letter. *Id.* If the action is dismissed, the notification must include the reason for dismissal. *Id.* § 13151.1.
  10. *Id.* § 11116.10(a).

## Criminal Procedure; sex offenses—sentence enhancements

Penal Code § 667.6 (amended).

AB 2295 (Killea); 1986 STAT. Ch. 1431

Sponsor: Author

Support: California Federation of Republican Women

Opposition: American Civil Liberties Union; The California Attorneys for Criminal Justice; California Public Defenders Association

Existing law requires a court to impose full, separate, and consecutive terms for each specified sex offense<sup>1</sup> committed by a defendant

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1. Specified sex offenses include any violations of Penal Code §§ 261(2)-(3) (rape by force or use of controlled substances); 264.1 (aiding or abetting rape); 286 (sodomy); 288(a) (oral copulation); 288(b) (lewd or lascivious acts involving children); and 289 (penetration by foreign object). Sections 286 and 288a are included only if committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. CAL. PENAL CODE § 667.6.



if the crimes involve separate victims, or the same victim on separate occasions.<sup>2</sup> Under prior law, courts had the discretion to impose full, separate, and consecutive terms for the commission of any of these specified sex offenses, in lieu of another designated term,<sup>3</sup> whether or not the crimes were committed during a single transaction.<sup>4</sup> Chapter 1431 was enacted in apparent response to the California Supreme Court decision of *People v. Craft*,<sup>5</sup> interpreting the provisions for full, separate, and consecutive terms for specified sex offenses as applying only to sex offenses against the same victim, in which the perpetrator temporarily lost or abandoned the opportunity to continue the attack between each offense.<sup>6</sup> Chapter 1431, however, abrogates the *Craft* decision<sup>7</sup> by asserting that neither the duration of time between crimes, nor whether or not the defendant lost or abandoned the opportunity to attack, will be determinative on the issue of whether the crimes in question occurred on separate occasions.<sup>8</sup> Instead, the court must consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon the actions taken, and nevertheless resumed sexually assaultive behavior.<sup>9</sup>

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2. CAL. PENAL CODE § 667.6. See *People v. Sutton*, 163 Cal. App. 3d 438, 443, 209 Cal. Rptr. 536, 539 (1985). When determining whether the offenses constitute separate occasions, the court should consider not only the passage of time, but also the events occurring between the two sets of offenses. *Id.*

3. See CAL. PENAL CODE § 1170.1 (aggregate and consecutive terms for multiple convictions and limitations on terms and enhancements).

4. 1985 Cal. Stat. ch. 401, sec. 1, at \_\_\_\_\_ (amending CAL. PENAL CODE § 667.6).

5. 41 Cal. 3d 554, 224 Cal. Rptr. 626 (1986). The *Craft* court held that three rapes committed on the same victim at different locations in over a two-hour period were not committed on separate occasions so as to require full, separate, and consecutive terms on each count. The court's decision was based on the fact that the rapes were not separated by a period in which the defendant lost or abandoned his opportunity to continue the attack because the victim was falsely imprisoned and subject to defendant's control during the entire period. In addition, there was no showing of any independent activities between the rapes which were not related to the rapes. *Id.* at 560, 224 Cal. Rptr. at 630.

6. *Id.* at 559, 224 Cal. Rptr. at 629.

7. 1986 Cal. Stat. ch. 1431, sec. 2, at \_\_\_\_\_ (it is the intent of the Legislature in the enactment of Chapter 1431 to abrogate the decision in *People v. Craft*, 41 Cal. 3d 554, 224 Cal. Rptr. 626 (1986), and to establish an objective test for determining whether sex crimes against a single victim occurred on separate occasions).

8. CAL. PENAL CODE § 667.6(d).

9. *Id.*

**Criminal Procedure; victims of crime—restitution**

Government Code § 13967 (amended).  
 SB 2404 (Hart); 1986 STAT. Ch. 1438  
 Sponsor: Attorney General

Existing law requires the court to order a person convicted of a crime and granted probation to make restitution as a condition of probation.<sup>1</sup> Restitution must be paid to the victim if the crime involved a victim, or to the Restitution Fund<sup>2</sup> if the crime did not involve a victim.<sup>3</sup> In addition, if the defendant is convicted of a felony, the court must order the defendant to pay a separate restitution fine, which is deposited into the Restitution Fund.<sup>4</sup> Chapter 1438 provides that, in cases in which a victim has suffered economic loss as a result of the defendant's criminal conduct, the court must order a defendant who is denied probation to pay restitution to the victim, in lieu of imposing all or a portion of the restitution fine.<sup>5</sup> The making of a restitution order will not affect the right of a victim to recover from the Restitution Fund, except to the extent that restitution is actually collected from the defendant pursuant to the order.<sup>6</sup>

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1. CAL. GOV'T CODE § 13967. *Cf.* *People v. Richards*, 17 Cal. 3d 614, 620, 552 P.2d 97, 101, 131 Cal. Rptr. 537, 541 (1976) (a party sued civilly has important due process rights, including the right to a trial by jury on the specific issues of liability and damages, and the judge in a criminal trial should not be permitted to emasculate those rights by simply declaring his belief that the defendant owes a sum of money).

2. CAL. GOV'T CODE § 13967(b) (the fine imposed must be deposited in the Restitution Fund in the State Treasury, the proceeds of which are continuously appropriated for the purpose of indemnifying persons filing claims).

3. CAL. PENAL CODE § 1203(b).

4. CAL. GOV'T CODE § 13967(a), (b). The fine cannot be less than \$100, nor more than \$10,000. In setting the amount of the fine for felony convictions, the court must consider any relevant factors including, but not limited to, the seriousness and gravity of the offense, the circumstances of commission of the offense, any economic gain derived by the defendant as a result of the crime, and the extent to which others suffered losses as a result of the crime. *Id.* § 13967(a).

5. CAL. GOV'T CODE § 13967(c). A restitution order must identify the losses to which the order pertains, and will be enforceable as a civil judgment. *Id.*

6. *Id.* Any restitution collected will be credited to other judgments for the same losses, obtained by the victim against the defendant, arising out of the crime for which the defendant was convicted. *Id.*

## **Criminal Procedure; written jury instructions**

Code of Civil Procedure § 612.5 (amended); Penal Code § 1093 (amended).

AB 2748 (Stirling); 1986 STAT. Ch. 1045

Sponsor: Author

Opposition: Judicial Council

Existing law provides that upon retiring for deliberation, a jury in a civil proceeding may, at the discretion of the court, take a copy of the written instructions into the deliberation room.<sup>1</sup> Existing law also authorizes a trial judge in a criminal jury trial to deliver copies of instructions to the jurors when the instructions are given.<sup>2</sup>

Chapter 1045 requires the court to advise the jury in civil and criminal proceedings that a written copy of the jury instructions is available.<sup>3</sup> Chapter 1045 further requires the court to supply the jury with a copy of the jury instructions upon request.<sup>4</sup>

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1. CAL. CIV. PROC. CODE § 612.5.

2. CAL. PENAL CODE § 1093(6).

3. CAL. CIV. PROC. CODE § 612.5; CAL. PENAL CODE § 1093(f).

4. CAL. CIV. PROC. CODE § 612.5; CAL. PENAL CODE § 1093(f).